88-1114

Supreme Court, U.S.
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No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

MARVIN and GERALD LEBMAN, Individually
and as Class Representatives of 3,596
FORMER SHAREHOLDERS OF NATIONAL UNION
ELECTRIC CORPORATION

Petitioners

v.

AKTIEBOLAGET ELECTROLUX,
a Swedish Corporation
DOMETIC INCORPORATED,
a Delaware Corporation
NATIONAL UNION ELECTRIC CORPORATION,
a Delaware Corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 4, 1988. Rehearing en banc was denied on August 30, 1988.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the dismissal without notice to the absent class members of a nationwide class action which was certified under Rule 23 (b) (3) Fed. R. Civ. Pro. violated the Due Process Clause of the Fifth Amendment and Rule 23 (c) (2) of the Federal Rules of Civil Procedure? If so, was the judgment of dismissal void as a matter of law?

2. How should the courts choose limitations periods for implied causes of action for sections 10 (b) and 14 (e) of the Securities and Exchange Act. of 1934?

(a) Should the courts continue to use the most appropriate limitations period of the forum state or should a limitations period be derived elsewhere from federal law?

(b) If the forum state's limitation period is used, What is the most appropriate limitations period? Should the courts use the state limitations period applicable to "Blue-sky" statutes or common law fraud actions? In this case, is the use of the limitations period of the state Securities Act more appropriate that the period applicable for a common law fraud action?

(c) If a limitations period is derived elsewhere from federal law, from whence should it come? Should it be based upon a conflict of law rule based upon federal common law? Should it be derived from the express limitations periods of the other

sections of the 1934 Act?

(d) If the appropriate limitations period is derived from the express limitations periods of the 1934 Act, when does it start to run? Who has the burden of proving when it started to run? What is the proper standard of knowledge, actual or constructive, used to determine when the statute begins to run?

LIST OF ALL PARTIES

The parties in the Court of Appeals for the Fifth Circuit were:
Marvin and Gerald Lebman
Appellants, Plaintiffs in the District
Court and Petitioners in this Petition,

3,596 Former Shareholders of
National Union Electric Corporation
as a class forced out pursuant
to a Merger on August 1, 1975 ("The Class")
Appellants, Plaintiffs (absent) in the
District Court and Petitioners herein,

Aktiebolaget Electrolux, a Swedish Corporation
Dometic, Inc., a Delaware Corporation
National Union Electric Corporation, a Delaware
Corporation,
Appellees and Defendants in the District Court.

LISTING UNDER SUPREME COURT RULE 28.01

Set forth below is a listing of the parent companies, subsidiaries and affiliates of the Respondents. On about 1987, Aktiebolaget Electrolux became the Electrolux Group of Companies and is set forth in the following divisions and subsidiaries:

* ELECTROLUX GROUP (AB) (FORMERLY AKTIEBOLAGET ELECTROLUX)
HUSQVARA SEWING MACHINE (subsidiary)
The Eureka Company (division)
The Kent Company (subsidiary)
* WHITE CONSOLIDATED INDUSTRIES, INC. (subsidiary)
Anaheim Mfg. Co. (division WCI)
Atherns Stove Works (division WCI)
Gerard Metal Craftsmen (division WCI)
KCP Co. (division WCI)
Richards - Wilcox (division WCI)
WCI Canada Limited (division WCI)
WCI Machine Tools & Systems (division WCI)
* NATIONAL UNION ELECTRIC CORPORATION (subsidiary)

(In 1987, Dometic, Incorporated was merged into White Consolidated Industries)

(*asterisk used to designate party litigants)

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The Opinion of the United States Court of Appeals for the Fifth Circuit, not yet reported, appears in Appendix A hereto.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 4, 1988. Petitioners' timely application for rehearing was denied on August 30, 1988, and this petition for Certiorari was filed within 90 days of the date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Sec. 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment of the United States Constitution is set forth in full text in Appendix E.U.S. Constitution Amendment V.

STATUTES INVOLVED

The sections of Texas limitations statutes which this case involves are:

Tex Rev. Civ. Stat. Ann art 5526 (Vernon 1985)

Tex. Rev. Civ. Stat. Ann art 581-33 (Vernon 1988)

Tex. Bus & Comm. Code 27.01. (Vernon 1987)

Tex. CIV. Prac. & Rem. Code 16.003 (Vernon 1985)

See Appendix F. for full text.

STATEMENT OF THE CASE

Marvin and Gerald Lebman, Petitioners, were stockholders in National Union Electric Corporation ("National Union"). On June 20, 1974, Respondent AKTIEBOLAGET ELECTROLUX, ("ELECTROLUX") A Swedish corporation, mailed an offer to purchase all outstanding shares of National Union common stock, at $28 per share to all stockholders. Through this offer, Electrolux acquired approximately ninety-two percent of National Union's outstanding shares, however, a total of 3,596 shareholders, including the Lebmans, chose not to accept. On August 1, 1975, National Union was merged with a wholly-owned Electrolux subsidiary, NUE. INC. pursuant to Delaware Corporation law. On or about August 5, 1975 a notice of merger was mailed to all remaining shareholders including Petitioners describing the merger, offering $28 per share or explaining the alternative remedy of appraisal of the shares pursuant to Delaware law. Most of the minority shareholders accepted the $28 per share offer; the Lebmans and five other shareholders elected to seek an appraisal in the Delaware Chancery Court. During the course of the appraisal proceedings, the Lebmans were allowed some limited discovery. Based upon that discovery and some independent investigation, on July 28, 1978, within three (3) years after the merger, the Lebmans filed suit in the United States District Court for the Western District of Texas under the federal securities laws and related state law claims including sections 10 (b) and 14 (e) of the Securities Exchange Act of 1934. 15 USC. Sec. 78; (b) and 78 n (e). The essence of the claims is (1) that at the time of the tender offer Electrolux fraudulently omitted its intent to merge with National Union; and, (2) that they intentionally undervalued the shares of National Union during the merger.

On November 20, 1984, after a six year delay caused by an extensive contest over personal jurisdiction of the Respondents,

the district court certified as a class, those 3,596 former National Union shareholders who refused to tender their shares pursuant to the Electrolux offer to purchase. See Appendix "C". It is undisputed that notice was never sent to the absent class members. Initially, there was extensive litigation over the form of notice to the class. The class notice was never approved by the district court and hence never sent despite the Lebmans' efforts (which included several vigorously opposed motions for approval of class notice filed through April 29, 1987).

On August 31, 1987, the district court granted Respondents' motion to dismiss in its entirety, holding that all complaints were time-barred. The basis of this holding was the Fifth Circuit's previous decision in *WOOD V. COMBUSTION ENGINEERING*, 643 F.2d 339 (5th Cir. 1981) which held that the Texas two-year limitations statute governed implied federal causes of action under the federal securities laws.

On appeal, the Lebmans urged that the Fifth Circuit reconsider its prior decision in *WOOD V. COMBUSTION ENGINEERING*, supra. in light of the Supreme Court's subsequent decisions in *WILSON V. GARCIA* 471 U.S. 261 (1985) and *AGENCY HOLDING CORP. V. MALLEY DUFF. and ASSOCIATES, INC.*, _____U.S. _____, 107 S. Ct. 2759, (1987). The Lebmans also urged by way of supplemental brief that the district court erred in dismissing this class action without notice to the absent class members.

On August 4, 1988, the Fifth Court of Appeals affirmed the judgment of the district court. The court held that neither *Wilson*, supra. or *Agency Holding*, supra. would change the result in the case. Further, the court noted that the class was certified, but dismissed before notice was given to the absent class members; however, it merely held that the dismissal had "no affect on the rights of those unnotified class members."

Because it determined that the two-year limitations statute applied to all of the Lebmans claims, the Fifth Circuit did not

reach the remaining issues on appeal.

Timely petition for rehearing *en banc* was filed by the Petitioners. This was denied on August 30, 1988.

REASONS FOR ALLOWING THE WRIT

I. CONFLICT, CONFUSION AND UNCERTAINTY EXIST AMONG THE CIRCUIT COURTS OVER HOW TO CHOOSE LIMITATIONS PERIODS FOR IMPLIED CAUSES OF ACTION UNDER THE FEDERAL SECURITIES LAWS.

Sections 10(b) and 14(e) of the Securities Exchange Act of 1934 do not contain a limitation statute. See 15 U.S.C. Sections 78j (b); 78 n (e). When a federal statute does not contain a statute of limitations period, the general rule is that the courts adopt the most appropriate, analogous state limitations periods. *Wilson v. Garcia*, 471 U.S. 261 (1985).

Because Congress did not expressly create a private cause of action under section 10(b) and 14(e), of the 1934 Act, it did not specify a limitations period for those actions. Courts have adopted the widely held practice of borrowing the most appropriate state limitations period of the forum state. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 210 n. 29 (1976).

However, this practice has resulted in myraid inconsistent federal court decisions. It is uncertain what statute of limitations is applicable in several federal circuits which can range from as short a period as one year in Maryland to ten years in Tennessee. See *Report of the Task Force on Statute of Limitations for Implied Actions* (ABA Committee on Federal Regulation of Securities) 41 Bus. Law. 645 (1986) (hereinafter ABA Report).

The Third Circuit Court of Appeals recently took the unprecedented step of adopting the limitation period for express causes of action under the Securities Exchange Act of 1934. See

In Re Data Access Systems Securities Litigation, 843 F.2d 1537 (3rd Cir. 1988). The step taken by the Third Circuit was expressly rejected by the Fifth Circuit in the instant case: "Federal statues of limitation are therefore applied only when 'it may be appropriate to conclude that Congress would choose to adopt state rules at odds with the purpose or operation of federal substantive law.'". (Fifth Circuit opinion, page 6). The Third Circuit's decision to adopt the 1934 Act express limitations periods adds more confusion and uncertainty to this conflict. As noted, the federal circuit courts of appeals disagree on every possible question about limitations periods in securities cases. Only Congress or the Supreme Court can bring uniformity and predictability to this field. See *In Re Data Access*, supra, 843 F.2d at 1540; ABA Report at 646-647, and 656-657.

This writer cannot re-duplicate the extensive and well reasoned analysis of Judge Aldisert in *In Re Data Access*, supra. and the thorough and well-researched evaluation made by the ABA Committee's Task Force on statute of limitations for implied actions (contained in the 41st volume of the ABA publication of *Business Lawyer*, 1986). Many of the cases which demonstrate the confusion which exists over how to select a statute of limitations for federal securities caes are collected in this ABA report. This writer can only urge that this Court review this important issue based upon the conclusion reached by the Third Circuit in *In Re Data Access* and the ABA report. These authorities contain an extensive survey by state and by circuit of the applicable limitations periods for 10b-5 actions. They illustrate and bolster this writer's conclusion that conflict, confusion, and uncertainly exist among the circuit courts over how to choose limitations periods for implied causes of action under the Federal securities laws.

II. THE FIFTH CIRCUIT DECISION IS IN CONFLICT WITH THE OTHER CIRCUITS AND THIS

COURT'S DECISIONS IN *WILSON V. GARCIA AND AGENCY HOLDING CORPORATION V. MALLEY-DUFF ASSOCIATES, INC.* AS TO THE DETERMINATION OF THE APPLICABLE STATUE OF LIMITATIONS PERIOD FOR IMPLIED CAUSES OF ACTION UNDER THE FEDERAL SECURITIES LAWS.

The Fifth Circuit rested upon the basis of its prior decision in *Wood v. Combustion Engineering*, supra., 643 F. 2d at 339. In *Wood*, the Fifth Circuit examined two Texas statutes that created causes of action resembling a 10b-5 claim: the Texas statute on fraud in real estate and stock transactions, Tex. Bus. & Com. Code. Ann. Sec. 27.01 (the "fraud statute") and Tex. Rev. Civ. Stat. Art. 581-33 (the "Blue Sky law"). The fraud statute (sec. 27.01) does not contain a time limit within which suit must be brough, but the two year period of Tex. Rev. Civ. Stat. Art. 5526 (Vernon 1985) (now codified in revised form at Tex. Civ. Prac. & Rem Code Ann. 16.003) is applied to actions based on fraud. The Blue Sky law expressly provides that an aggrieved buyer (or seller) of securities generally must sue within three years after the discovery of the untruth of omission of a material fact or within five years after the sale (or purchase).

In *Wood*, the Fifth Circuit further examined the elements of the fraud statute and the elements of the Blue Sky law and compared each to the elements of 10b-5. The court stated that two major considerations, which go to the very heart of the substantive causes of action convinced the court that the Blue Sky law was broader that the fraud statute of 10b-5, *Wood*, supra at 345. Reliance and scienter were found to be elements of the fraud statue and 10b-5, but not the Blue Sky law. Based upon this analysis, the court held that the two year limitations statute applies to any 10b-5 actions in Texas. 643 F.2d at 345. The Fifth Circuit in the instant case merely reaffirmed its earlier holding in *Wood*, supra.

However, this particular approcach has been rejected by

other circuits see e.g. *O'Hara v. Kovens*, 625 F.2d 15, 17 (4th Cir. 1980), *Carothers v. Rice*, 633 F.2d 7, 13-14 (6th Cir. 1980); *Morris v. Stifel, Nicolas & Co.*, 600 F.2d 139, 143 (8th Cir. 1979); *Friedlander v. Troutman, Sanders and Lockerman*, 788 F.2d 1500, 1507 (11th Cir. 1986). It should be noted that the Fifth Circuit itself has rejected this particular approach to 10b-5 actions in Alabama and Louisiana. See *White v. Sanders*, 650 F.2d 627 (5th Cir. 1981) (Alabama Law); *Dupuy v. Dupuy*, 551 F.2d 1005 (5th Cir. 1977) (Louisiana law). This intra-circuit conflict is accompanied by widespread conflict among the circuits over the question as to what is the most appropriate limitations period to be adopted.

Although comparison of the elements of the state and federal claims is helpful, it should not be decisive. A surer guide to a proper analogy in this context should be the relationship of the state statute of limitations to the underlying substantive claim. Where a state statute of limitations is part of a regulatory scheme that is addressed to misinformation in the sale of securities and uses similar federal statutes as its model, then the claims covered by that statute of limitations are more analogous to rule 10b-5 than are those falling under a catch-all provision that covers a wide variety of disparate conduct. *Roberts v. Magnetic Metals Co.*, 611 F.2d 450, 462 (Seitz J. dissenting.)

In both *Wilson v. Garcia*, supra and *Agency Holding Corp. v. Malley-Duff Assoc.*, supra., this Court outlined a procedure to be followed in determining the appropriate statute of limitations for a federal claim. The first step involves characterizing a federal claim. In this step, we must determine whether all claims arising out of the federal statute should be characterized the same way, or evaluated differently depending on the factual circumstances or legal theories involved. *Id.* Once this characterization is made, the next inquiry is whether a federal or state statute of limitations should be used. *Id.* It is clear that the Fifth Circuit has misconceived and misapplied this procedure. The

Wood court did not characterize all 10b-5 actions the same way. Instead, it analyzed the statutes on an element by element basis, similar to a claim by claim basis. See 643 F.2d at 343. A 10b-5 claim cannot be characterized as a "fraud" claim. This Court has instructed that section 10(b) and common law fraud actions are two distinct breeds. Thus, the Court has refused to impose in the section 10(b) schema the traditional common law requirement in state fraud proceedings that plaintiffs establish their case by clear and convincing evidence. *Herman & Mac Lean v. Huddleston*, 459 U.S. 375, 390 (1983). This Court has indicated that common law doctrines of fraud that developed around transactions involving trangible items of wealth are ill-suited to the sale of intangibles such as securities. *SEC. v. Capital Gains Research Bureau, Inc.* 375 U.S. 180, 195, (1963).

The two year limitations statute adopted by the *Wood* court applies to a wide variety of tort actions rather than just common law fraud. It is pointed out that the section 27.01 fraud statute had no limitations period but used the general two year limitations statute. This makes it comparable to a general "catchall" limitations period rejected in *Wilson*, supra and *Agency Holding*, supra. The Fifth Circuit in the instant case erroneously held that the analysis used in *Wood*, supra was consistent with this Court's holdings in *Wilson* supra and *Agency Holding*, supra.

If a state statute of limitations should be used, the proper characterization of these claims should be claims based on a statute comparable to the Texas Securities Act. That statute and other "Blue Sky" laws include a policy of repose more in conformity with the policy of repose deliberately chosen by Congress with respect to claims based on the express provisions of the Securities Exchange Act. Ultimately, the question of which is the appropriate limitations period is one of congressional intent. *Agency Holding*, supra. In view of the foregoing, the Court should take the opportunity afforded by the instant case to clarify the approach to be used in borrowing state

limitations periods for implied causes of action arising under the federal securities laws. The differing approaches taken by the circuit courts has caused considerable confusion and uncertainty. The confusion has mounted to the point where different panels of the Fifth Circuit have taken different approaches to the same issue. Perhaps, in the wake of the Third Circuit's decision in *In Re Data Access Systems Securities Litigation*, supra this Court should determine whether a federal period is more applicable.

In a securities case as in a RICO complaint, the operative (predicate) acts will often occur in several states. A civil rights action will normally involve a dispute wholly within one state. The multistate nature of the federal securities indicates either a uniform federal statute of limitations or a uniform characterization under federal law. A broker in New York, an issuer in Delaware, a purchaser in San Francisco, an accountant in New Jersey and a lawyer in Philadelphia should be subject to the same statute of limitations in federal securities fraud actions. The federal policies at stake and the practicalities of litigation make federal law a significantly more appropriate vehicle for interstitial lawmaking. *Agency Holding* supra. This consideration should apply in this case as a nationwide class of plaintiffs are involved.

III. THE CIRCUIT COURTS ARE IN CONFLICT OVER WHEN THE LIMITATIONS PERIOD BEGINS TO RUN IN IMPLIED ACTIONS UNDER THE FEDERAL SECURITIES LAWS.

The federal doctrine of equitable tolling has been uniformly applied by federal courts in federal securities cases. see *e.g. Suslick v. Rothschild Sec. Corp* 741 F. 2d 1000 (7th Cir. 1984) The problem is that some courts apply it differently in certain aspects than others. For instance, some courts take into account an individual's sophistication in business matters in determin-

ing when the statute begins to run; others apply the objective reasonable investor standard. *ABA Report* 654-655 Because different standards may be applied by different courts and to different plaintiffs, it is impossible to predict when a cause of action will finally be barred. *Id.*

If the express limitations provisions of the 1934 Act, 15 U.S.C. 78 r (c) are adopted by this court, questions will arise as to the meaning of "discovery" in the context of that federal statute. Petitioners expressly reserve the right to brief this particular issue in more detail as the legislative history of the 1934 Act is particularly relevant as to who has the burden of proving when limitations period starts to run and the proper standard of knowledge revelant to tolling questions. see *Congressional Record - Senate* pp 199-200 (May 7, 1934)

This Court should take the opportunity to clarify this recurring problem with limitations period in the federal securities laws.

IV. THE FIFTH CIRCUIT'S REFUSAL TO VACATE THE DISTRICT COURT'S JUDGMENT OF DISMISSAL CONFLICTS WITH THE SEVENTH CIRCUIT AND *EISEN V. CARLISLE & JACQUELIN* WITH RESPECT TO THE RIGHTS OF THE ABSENT CLASS MEMBERS PURSUANT TO RULE 23 (C) (2) FED. CIV. PRO. AND FIFTH AMENDMENT DUE PROCESS.

Petitioners assert that dismissal of this cause without notice to the absent class members, was a violation of Fifth Amendment due process and Rule 23 (c) (2) of the Federal Rules of Civil Procedure.

When a class has been certified as the class here was, under Rule 23 (b) (3) of the Federal Rules of Civil Procedure, notice and an opportunity to "opt-out" must be sent to absent class members. Fed. R. Civ. Pro. 23 (c) (2). Notice to (b) (3) class members is a mandatory and unambiguous requirement of Rule

23. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176, 94 S. Ct. 2140, 2152, 40 L. Ed. 2d. 732 (1974) The judgment dismissed all claims in "their entirety". Therefore, the claims on behalf of the class were also dismissed. The Fifth Circuit affirming the District Court's dismissal in its opinion, noted that the case was dismissed before notice was given to the class members; however, it stated, in footnote on page 5 of opinion, that the dismissal "has no effect (sic.) on the rights of the un-notified class members". This dictum is incorrect in several respects: first, it is contrary to the express language of Rule 23 (c) "...the judgment, whether favorable or not, will bind all class members not requesting exclusion..." Rule 23 (c) (2) (b) Fed. R. Civ. Pro.; second, the commencement of a class action tolls the applicable statute of limitations as to all members of the class. *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974). But, the dismissal of this case may have restarted the running of the limitations against any claims that the un-notified class members may have. An absent class member from New York could rely on his own forum state's six (6) year limitations period. During the pendency of this litigation, limitations have been tolled. *American Pipe*, supra. However, without notice, the absent class member can do nothing to protect his interests. He may not take solace that the doctrines of claim and issue preclusion may not apply to him. The absent class members' rights deserve protection of individual notice which due process requires in the case.

The Advisory Committee's Note to Rule 23, described subdivision (c) (2) as "not merely discretionary" and that the "mandatory notice pursuant to subdivision (c) (2)...is designed to fulfill requirements of due process to which the class action is of course subject." 39 F.R.D. 69, 106-107. Petitioners point out that absent class members may be bound by a judgment where they are in fact adequately represented by the class representative, who is before the Court. *Hansberry v. Lee*, 311

U.S. 32 (1940). The District Court, in certifying the class, expressly found that the Lebmans adequately represented the class, Rule 23 speaks to notice as well as to adequacy of representation and requires that both be provided. *Eisen*, 417 U.S. at 176, 40 L.Ed. 2d at 748. Therefore, the absent class members were entitled to notice prior to the District Court's dismissal.

The Due Process Clause requires, at a minimum, that the absent Plaintiff in a class action must receive notice plus an opportunity to be heard and participate in the litigation whether in person or through counsel. *Phillips Petroleum Co. v. Shutts*, 472 U.S.797 , (1985). An elementary and fundamental requirement of due process is notice, reasonably calculated, under all circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-315 (1950). The District Court's dismissal deprived the absent class members of the opportunity to protect their interests. Consequently, the dismissal deprived them of due process and violated Rule 23.

In order to achieve the economy and efficiency of a representative action and to prevent the rule from being utilized solely as a permissive joinder or intervention device, subdivision (c) (2) of Rule 23, purports to include all the members in a Rule 23 (b) (3) class in the final judgment in the suit. Wright and Miller, *Federal Practice & Procedure*. Sec. 1786 (1985). Therefore, notice is crucial to the scheme of Rule 23. The notice serves to inform the absentees, who otherwise might not be aware of the proceeding, that their rights are in litigation so that they can take whatever steps they deem appropriate to make certain that their interests are protected. In this way, it guarantees each class member an opportunity to have his day in court or at least, to oversee the conduct of the action by the class representatives. *Id.* Judgments dismissing the class action, without notice to the

absent class members, are void as a matter of law. *Gert v. Elgin National Industries, Inc.* 773 F2d 154, 159, (7th Cir. 1985); *West v. Capitol Federal Savings and Loan Assn.*, 558 F.2d 977, 980 (10th Cir. 1977). In *Gert*, supra., the Seventh Circuit held, in a securities fraud class action (which was certified as a class), an order dismissing the claim before notice was sent to the absent class members was void. 773 F.2d at 159.

Therefore, the Fifth Circuit has refused to follow the Seventh Circuit by failing to vacate the dismissal judgment as to the absent class members. A horrible injustice has been committed against the absent class members who without notice of any kind cannot effectively protect their rights. What good does declaring that the dismissal judgment has no effect on the unnotified class members rights, if they, through lack of notice, cannot do anything to protect those rights? Rule 23 was designed to protect the rights of absent class members by requiring notice. To hold otherwise, would render Rule 23 a nullity. The district court's dismissal should be vacated as to the absent class members and notice be given to them pursuant to Rule 23 (c) (2).

CONCLUSION

This Court should take the opportunity provided by this case to end this conflict and confusion in this area of the federal securities laws. Opportunity is also presented to redress an injustice to the rights of the absent class members. For the foregoing reasons, a Writ of Certiorari should issue to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,
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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 87-5580

MARVIN LEBMAN, Individually, et al.,

Plaintiffs-Appellants,

Cross-Appellees,

versus

AKTIEBOLAGET ELECTROLUX,

a Swedish Corp., et al.,

Defendants-Appellees,

Cross-Appellants.

Appeals from the United States District Court

for the Western District of Texas

(AUGUST 4, 1988)

Before GOLDBERG, GARWOOD and JOLLY, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:*

Appellant Marvin Lebman challenges the district court's dismissal of his Rule 10(b)(5) class action and pendent state claims. The district

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

court applied the two-year statute of limitations of Texas, the forum state, rather than the three-year rule used in Delaware, the state in which the cause of action arose. Lebman argues that this decision violates the full faith and credit clause of the United States Constitution. The district court ruled, however, that this case is controlled by our decision in Wood v. Combustion Engineering, 643 F.2d 339 (5th Cir. 1981). Because we agree that, under Wood, the two-year statute of limitations is controlling, that no violation of Lebman's constitutional rights has occurred and that the district court properly applied the two-year statute of limitations to all Lebman's claims, we affirm.

I

Marvin and Gerald Lebman, Texas residents, were stockholders in National Union, Inc., a Delaware corporation. On June 20, 1974, Aktiebolaget Electrolux, a Swedish corporation, mailed an offer to purchase all outstanding shares of National Unions's common stock, at $28 per share to all stockholders. Through this offer, Electrolux acquired approximately ninety-two percent of National Unions's outstanding shares; however, a total of 3,596 shareholders, including

the plantiffs, chose not to accept. On August 1, 1975, National Union was merged with an Electrolux subsidiary, NUE, Inc., under the short-form merger provisions of the Delaware General Corporation Law. On August 5, a notice of merger was mailed to all remaining holders of common stock in National Union, including Marvin and Gerald Lebman. The notice explained that these minority shareholders were entitled either to receive $28 per share or to seek an appraisal of the value of the shares pursuant to Delaware law. Most of the minority shareholders accepted the $28 per share offer in August of 1975. The Lebmans and five other shareholders elected to seek an appraisal, which was filed on December 22, 1975. A hearing was conducted, and on November 3, 1978, an appraiser found that as of August 1, 1975, a share of common stock in National Union was worth $24.85 or $3.15 per share less that Electrolux had paid.

Meanwhile, on July 28, 1978, the Lebmans filed this suit in federal district court of Texas for fraud under Rule 10(b)(5). Their claim in its essence is that at the time of the initial tender offer Electrolux fraudulently concealed its intent to merge with National Union to the shareholders' detriment, and then intentionally

undervalued the shares of National Union during the Merger.

Initially the district court permitted this case to proceed under Delaware law. In March 1987, however, the court determined that under our rule in Wood v. Combustion Engineering, 643 F.2d 339 (5th Cir. 1981), the two-year Texas statute of limitations should apply to this Rule 10(b)(5) action because Texas is the forum state, even though the substantive law of Delaware would apply since the merger took place there. The court also found that on each of the thirteen counts raised in the plaintiffs' third amended complaint, the Lebmans had notice of all their claims no later than August 12, 1975, the day they received the document entitled "Notice of Merger." The court found that this document contained sufficient information, to alert the Lebmans not only of the impending merger, but also of the basis of their claims concerning misrepresentation of the value of their shares. Since more than two years had passed from that date until the date the Lebmans filed suit, therefore, the district court dismissed all of their claims.

On appeal, the Lebmans argue that the district court's decision violates the full faith and credit clause of the Constitution. Although they acknowledge that the district court's decision was controlled by our prior holding in Wood, they urge this court to reconsider that decision in the light of two recent Supreme Court cases, Wilson v. Garcia, ___ U.S. ___, 105 S.Ct. 1938 (1985), and Agency Holding Corp. v. Malley-Duff and Associates, ___ U.S. ___, 107 S.Ct. 2759 (1987). Electrolux cross-appeals, contending that the district court's only error was to certify a class constituting all 3,596 minority shareholders, despite the fact that all but 5 of those shareholders accepted the $28 per share offer made in August 1975.[1] Because we find no error in the district court's decision that all the claims in this case are barred by the statute of limitations, we do not reach the plaintiffs' other issues or issues on cross-appeal.

II

There is no question that our rule in Wood v. Combustion Engineering controls the prescriptive issues as relates to 10(b)(5) claims in this case. It is clearly established that Rule 10(b)(5) actions should be governed by the statute of

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[1]Apparently this class was certified but the case was dismissed before notice was given to any of the class members. The judgement of dismissal below and this opinion, therefore has no affect on the rights of those unnotified class members

limitations of the forum state. McNeil v. Payne Webber Jackson & Curtis, Inc., 598 F.2d 888 (5th Cir. 1979). In Wood, we further held that in Texas a two-year statute of limitations should apply. Wood, 643 F.2d at 345. The Lebmans argue that we should reexamine our holding in Wood in the light of recent Supreme Court opinions, and apply either the Delaware or Texas three-year statute or a comparable rule from federal law. Neither of the Supreme Court cases the Lebmans cite would alter our decision in Wood, however. On the contrary, the decisions in both cases indicate that the analysis used by our circuit in Wood, and by the district court here, is correct. As these cases both carefully explain, "Given our long-standing practice of following state law, and the congressional awareness of this practice, we can generally assume that Congress intends by its silence that we borrow state law." Agency Holding, 107 S.Ct. at 2762. Federal statutes of limitations are therefore applied only when "it may be inappropriate to conclude that Congress would choose to adopt state rules at odds with the purpose or operation of federal substantive law." DelCostello v. Teamsters, 462 U.S. at 161. This reasoning is entirely consistent with the analysis used by

this circuit in Wood. Neither case presents any reason to reconsider that holding.

III

Similarly, we find no constitutional violation of the full faith and credit doctrine by applying the Texas statute of limitations here. Lebman attempts to argue that the substantial contacts rule used when determining what substantive law to apply should be extended to the decision of what statute of limitations to use, and would therefore require that the Delaware three-year statute, instead of the Texas two-year statute, be employed. This issue, however, has long been settled. "The full faith and credit clause does not compel the forum state to use the period of limitation of a foreign state." Wells v. Simonds, 345 U.S. 514, 517 (1953). See also Sun Oil Co. v. Wortman, ___ U.S. ___, 56 U.S.L.W. 5601 (June 15, 1988).

IV

The Lebmans also argue that the district court erred when it applied the two-year, instead of the four-year, statute of limitations to those state-based claims in which they allege breach of fiduciary duty. They rely upon two Texas

state court cases, Greenspun v. Greenspun, 198 S.W.2d 82 (Tex. 1946), and Yeaman v. Galveston Co., 167 S.W. 710 (Tex. 1914), in which the four--year limitations period was applied. As this court has noted, however, the type of action that falls within the rule of Greenspun and Yeaman is of a "relatively narrow variety" in which "individual stockholders of a dissolved corporation [sue] to recover their share of its undistributed assets and for related accounting." Maher v. Zapata Corp., 714 F.2d 463 n.50 (5th Cir. 1983). The present action does not fall within that narrow category, and so these cases are not controlling. Instead, the Texas two-year statute of limitations generally applies to breach of fiduciary duty, Crutcher Rolfs Cummings, Inc. v. Ballard, 540 SW2d, 380 (CT. Civ. App. Tx 1976 r'hg den. 1976); International Bankers Life Ins. Co. v. Holloway, 368 SW2d 567 (Tx 1963). Moreover, even though the Lebman's denominate their state-law claims a breach of fiduciary duty, the gravamen of the their state law claims is fraud, making it most analagous to the claims raised by plaintiffs in Breen v. Centex Corp., 695 F.2d 907 (5th Cir. 1983). In that case, which involved a shareholders action for deceptive practice by the corporation's president in

connection with exchange of stock, we held that: "Texas law indicates that the two-year period of limitations should also be applied to the state statutory and common-law fraud actions." Breen, 695 F.2d at 911 (citations omitted). Thus the district court correctly applied the two-year statute of limitations to the Lebman's state law claims.

V

Finally, the Lebmans complain that the district court erroneously held that they had notice of all their claims on or before August 12, 1975, the day they received the notice of merger. The district court found that the notice of merger plainly and fully described the transaction that was to occur and that the document would put reasonable people on notice of the merger and of the foreseeable consequences of which the Lebmans now complain.[2] We do not find reversible error in this decision.

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[2]The Lebmans claim that the notice of merger was insufficient because it disclosed the amount of a pending lawsuit against a third party, at less than what the corporation eventually demanded in its complaint. The district court opinion gives several sound reasons for its ruling that the notice was sufficient however. Most notably, as the court explains, the notice of merger did not purport to allege the full value claimed but said the corporation intended to sue for an amount of "at least $360,000,000" and this was sufficient notice that the amount could be much higher.

VI

Having thus determined that the two-year statute of limitations applies to all of the Lebmans' claims, and that more than two years elapsed from the date of notice to the date they filed suit, we find that it is not necessary to decide the remaining issues on appeal or cross-appeal.[3]

For these reasons, the judgement of the district court is

A F F I R M E D.

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[3]The appellant's motion to file a supplemental brief has been GRANTED and the brief has been considered.

IN THE UNITED STATES COURT OF APPEALS
OR THE FIFTH CIRCUIT

No. 87-5580

MARVIN LEBMAN, Individually,
ET AL.,
Plaintiffs-Appellants,
Cross-Appellees,

versus

AKTIEBOLAGET ELECTROLUX, A
Swedish Corporation, ET AL.,
Defendants-Appellees,
Cross-Appellants,

Appeal from the United States District Court
for the Western District of Texas

ON SUGGESTION FOR REHEARING EN BANC
(Opinion August 4, 5 Cir., 1988, F.2d)
(August 30, 1988)

Before GOLDBERG, GARWOOD and JOLLY, Circuit Judges.

PER CURIAM:

(X) Treating the suggestions for rehearing en banc as petitions for panel rehearing, it is ordered that the petitions for panel rehearing are DENIED. No member of the panel nor Judge in the regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestions for Rehearing En Banc are DENIED.

. . .

ENTERED FOR THE COURT:
(SIGNED)E. Grady Jolly
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MARVIN LEBMAN, ET AL., Plaintiffs,	)	
v.	)	
AKTIEBOLEGET ELECTROLUX, ET AL., Defendants,	)	CAUSE NO. SA-78-CA-258

ORDER

ON THIS DATE came on to be considered the Plaintiffs' motion for class certification.

The Plaintiffs to this action, Marvin and Gerald Lebman, are seeking to represent approximately 3,595 former shareholders of National Union Electric Corporation's common stock who, the Plaintiffs allege, were defrauded in connection with the tender offer for shares of National Union Electric Corporation made by Aktieboleget Electrolux. Plaintiffs further allege that a subsequent short-form merger of National Union Electric Corporation into National Union Electric, Inc. was part of a scheme to defraud National Union Electric Corporation minority shareholders. In sum, Plaintiffs contend that the Defendants

engaged in a course of conduct designed to force out minority National Union Electric Corporation shareholders and to fraudulently deprive them of the full value of their stock. After reviewing the materials submitted by the parties and after hearing evidence and argument presented at a hearing on this matter before the Court on November 8, 1984, this Court is of the opinion that class action certification should be granted.

The class sought to be certified involves approximately 3,595 minority shareholders of National Union Electric Corporation who in all likelihood are spread throughout the country. This Court finds that it would be impractical to join all such individuals in this case and that there would be unwarranted costs and inconvenience if the controversy presented by the Plaintiffs were resolved by individual lawsuits.

This Court also finds that the Plaintiffs' claims raise issues of law or fact that are common to all members of the class. All members of the class that will be certified by this Court received copies of the tender offer made by Aktieboleget Electrolux on June 20, 1974, and received notice of the merger of National Union Electric Corporation with National Union Electric, Inc. on August 1, 1975. Both the facts and legal issues involved

in this cause arise from alleged misrepresentations made in connection with the tender offer and subsequent merger and thus this Court is of the opinion that Federal Rule of Civil Procedure 23(a)(2) is satisfied.

The Defendants have asserted that there exists a unique defense against the Plaintiffs in this cause that arises from an appraisal action that occurred in the State of Delaware Chancellory Court. Defendants argue that the res judicata effect of the Delaware Court decision renders Plaintiffs inadequate representatives of the class sought to be represented in this cause. This Court has reviewed the submissions of the parties on this matter and is of the opinion that the res judicata defense available against the Plaintiffs is not likely to consume a significant part of the Plaintiffs' or this Court's energies to the detriment of the class sought to be represented. This Court is of the opinion that the Plaintiffs possess sufficient knowledge and resources to represent the class sought to be certified and, despite the existence of a unique defense against the Plaintiffs, this Court believes that the Plaintiffs will fairly and adequately protect the interests of the class.

Lastly, this Court believes that the questions of law and fact common to the members of the class predominate over any questions relating to individual members and finds that a class action is a superior method to achieve a fair and efficient adjudication of the controversy involved in this cause. This Court finds no interest of individual members of the class to control the prosecution and is unaware of any other proceeding commenced by any member of the class against the Defendants. While this Court does not believe that hearing this cause in the Western District of Texas is necessarily more desirable than having the claims adjudicated in another forum, this Court believes that it is appropriate to concentrate the litigation in one forum and, for that purpose, to concentrate the action in this Court is desirable. Finally, this Court finds that there would be no unusual difficulties encountered in managing this action as a class action. Therefore,

IT IS HEREBY ORDERED that those former shareholders of National Union Electric Corporation's common stock who received and refused to accept an offer made by Aktieboleget Electrolux on June 20, 1974, to purchase their stock at $28.00 per share and who subsequently received notice of

the merger to occur between National Union Electric Corporation and National Union Electric, Inc. on August 1, 1975, be certified as a class pursuant to Rule 23 of the Federal Rules of Civil Procedure to be represented by the Plaintiffs in this cause.

IT IS FURTHER ORDERED that the Plaintiffs shall resubmit a proposed notice to members of the class complying with Rule 23(c)(2) of the Federal Rules of Civil Procedure within fifteen (15) days of the entering of this Order and shall set forth their recommendation as to how this Court should direct notice to members of the class certified.

IT IS FURTHER ORDERED that the Defendants shall respond to the Plaintiffs' proposed notice and proposed method of giving notice by the Court within ten (10) days after having received such proposals from the Plaintiffs.

SIGNED and ENTERED this 20th day of November, 1984, at 3:15 P.M.

(Signed) William S. Sessions
WILLIAM S. SESSIONS
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MARVIN LEBMAN, ET AL., Plaintiffs,	§	
v.	§	
AKTIEBOLAGET ELECTROLUX, ET AL.,	§	CAUSE NO. SA-78-CA-258
Defendants.	§	

JUDGMENT

ON THIS DATE came on to be considered the Judgment in the above-styled and numbered cause, and

It appearing to the Court that it has by Order this day dismissed this cause with prejudice,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the above-styled and numbered cause be and is hereby DISMISSED WITH PREJUDICE, with Plaintiff to bear the costs of court.

SIGNED and ENTERED this 31st day of August, 1987, at 2 P.M.

(Signed) William S. Sessions
WILLIAM S. SESSIONS
Chief Judge

U.S. Constitutional Amendment V

No person shall ..... be deprived of life, liberty, or property, without due process of law.....

Tex. Rev. Civ. Ann. art. 581-33 H. (2) (a) (6)
Art. 581-33 Civil Liabilities
H. Statute of Limitations

(2) No person may sue .....

(a) more than three years after discovery of the untruth or omission, or after discovery should have been made by the exercise of reasonable diligence; or

(6) more than five years after the sale; .....

Tex. Civ. Prac. & Rem Code

§ 16.003. Two-Year Limitations Period

(a) A person must bring suit for trespass for injury to the estate or to the property of another, conversion of personal property, taking or detaining the personal property of another, personal injury, forcible entry and detainer, and forcible detainer not later than two years after the day the cause of action accrues.

Tex. Rev. Civ. Ann. art. 5526

Art. 5526. Actions to Be Commenced in Two Years

There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description: . . .

1. Actions of trespass for injury done to the estate or the property of another.

2. Actions for detaining the personal property of another, and for converting such property to one's own use.

3. Actions for taking or carrying away the goods and chattels of another.

4. Actions for debt where the indebtedness is not evidenced by a contract in writing.

APPENDIX

Tex. Bus. & Comm. Code § 27

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§ 27.01. Fraud in Real Estate and Stock Transactions

(a) Fraud in a transaction involving real estate or stock in a corporation or joint stock company consists of a

(1) false representation of a past or existing material fact, when the false representation is

a. made to a person for the purpose of inducing that person to enter into a contract; and

b. relied on by that person in entering into that contract; or

(2) false promise to do an act, when the false promise is

a. material;

b. made with the intention of not fulfilling it;

c. made to a person for the purpose of inducing that person to enter into a contract; and

d. relied on by that person in entering into that contract.

(b) A person who makes a false representation or false promise commits the fraud described in Subsection (a) of this section and is liable to the person defrauded for actual damages.

(c) A person who makes a false representation or false promise with actual awareness of the falsity thereof commits the fraud described in Subsection (a) of this section and is liable to the person defrauded for exemplary damages. Actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.

(d) A person who (1) has actual awareness of the falsity of a representation or promise made by another person and (2) fails to disclose the falsity of the representation or promise to the person defrauded, and (3) benefits from the false representation or promise commits the fraud described in Subsection (a) of this section and is liable to the person defrauded for exemplary damages. Actual awareness may be inferred where objective manifestations nidicate that a person acted with actual awareness.

(e) Any person who violates the provisions of this section shall be liable to the person defrauded for reasonable and necessary attorney's fees, expert witness fees, costs for copies of depositions, and costs of court.